United States Court of Appeals

for the Second Circuit

APPELLEE'S BRIEF AND APPENDIX

75-1408

To be argued by
CARL M. BORNSTEIN

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P/S

United States Court of Appeals

FOR THE SECOND CIRCUIT

Docket No. 75-1408

UNITED STATES OF AMERICA,
Appellee,

—v.—

ISADORE MARION,
Defendant-Appellant.

ON APPEAL FROM THE UNITED STATES DISTRICT COURT
FOR THE SOUTHERN DISTRICT OF NEW YORK

BRIEF AND APPENDIX FOR THE UNITED STATES OF AMERICA

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BRIEF FOR THE UNITED STATES OF AMERICA

Preliminary Statement

Isadore Marion appeals from a judgment of conviction entered on November 20, 1975, in the United States District Court for the Southern District of New York, after a four day trial before the Honorable William C. Conner, United States District Judge, and a jury.

Indictment 74 Cr. 821, in three counts, was filed on August 27, 1974. Count One charged that on December 20, 1973 and January 8, 1974 Marion appeared before a federal grand jury and made declarations which were inconsistent to the degree that one of them was necessarily false, in violation of Title 18, United States Code, Section 1623(c). Counts Two and Three charged that Marion, by giving false and evasive answers to certain questions asked of him during those grand jury appearances, endeavored to impede and obstruct the due admin-

istration of justice, in violation of Title 18, United States Code, Section 1503.

On September 22, 1975, an evidentiary hearing was held to determine if certain state eavesdropping warrants had been executed so as to "minimize" the interception of non-authorized conversations. Trial began on September 23, 1975 and concluded on September 26, 1975 when the jury convicted Marion of all three counts.

On November 20, 1975, Judge Conner suspended the imposition of sentence and as to each count placed Marion on probation for a concurrent term of three years, all of which were to run consecutively to a federal probationary sentence Marion was already serving.

Statement of Facts

The Government's Case

The evidence at trial established that pursuant to a grant of use immunity, 18 U.S.C. §§ 6001-6003, Isadore Marion appeared before a federal grand jury of the Southern District of New York on two occasions, December 20, 1973 and January 8, 1974, and made declarations which were inconsistent to the degree that one of them was necessarily false, in violation of Title 18, United States Code, Section 1623(c) (Count One); and gave false and evasive answers to certain of the questions propounded, thereby obstructing justice in violation of Title 18, United States Code, Section 1503 (Counts Two and Three). Broadly speaking, Marion was questioned in the grand jury on the basis of two conversations that had been intercepted and recorded some two years New York State Supreme Court. Those warrants, dated February 3, 1972 and March 15, 1972 (respectively, "the earlier pursuant to two eavesdropping warrants of the

Lounge order" and "the Delmonico order")* authorized the District Attorney of New York County to conduct electronic surveillance of telephones located at two Manhattan locations—Jimmy's Lounge and the Delmonico Hotel (G. App. 1a, 7a).** The warrants authorized, respectively, the interception of communications relating to, *inter alia*, the crime of grand larceny by extortion, felonious assault and conspiracy to commit those crimes, in violation of Articles 155, 120 and 105 of the New York Penal Law (the Lounge order); and the crime of possession of dangerous weapons, in violation of Article 265 of the New York Penal Law (the Delmonico order). The Government's proof at trial consisted largely of reading the pertinent portions of Marion's testimony before the grand jury on the two dates in question, and playing the tapes of the two above mentioned intercepted conversations (Tr. 23-27, 31-32; GX 2, 2C, 3, 3B).

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* The two warrants (which, along with copies of the transcripts of the two telephone conversations pertinent to this case, are reproduced in the Government's Appendix) and Marion himself are no strangers to this Court. The Lounge order was the first of a net of 29 state wiretap warrants the propriety of whose execution—with respect to matters not here at issue—was twice affirmed by this Court. *United States* v. *Rizzo*, 491 F.2d 215 (2d Cir.), *cert. denied*, 416 U.S. 990 (1974); *United States* v. *Rizzo*, 492 F.2d 443 (2d Cir.), *cert. denied*, 417 U.S. 944 (1974). Marion himself, in connection with the trial of Indictment 72 Cr. 1332 (S.D.N.Y.), contested the sufficiency of the showing of probable cause supporting both the Lounge and Delmonico orders. The District Court rejected that contention and at the subsequent trial admitted conversations intercepted pursuant to both orders, including the same conversation with Tortora Marion challenges here. Marion's conviction in that case was affirmed by this Court without opinion. *United States* v. *Marion*, 493 F.2d 1399 (2d Cir. 1974), *cert. denied*, 419 U.S. 872 (1975).

** "G. App." refers to the Government's Appendix; "D. App." the Defendant's Appendix; "Tr." the pages of the trial record; and "H." the pages of the minimization hearing that immediately preceded the trial. "GX" designates Government exhibits.

The first of these conversations, which was between Marion and one Vincent Tortora ("the Tortora conversation") was intercepted on February 8, 1972 pursuant to the Lounge order. In this conversation, Marion explicitly asked Tortora to "mess up" six or seven trucks belonging to a New Jersey carter named Capasso; declined Tortora's offer to perform the requested service for free, instructing him to "put a price" on his services; and advised Tortora that in so doing he should "be fair" because "there's good people involved." In his testimony of December 20, 1973 before the grand jury, which was then investigating, among other things, possible Hobbs Act violations (18 U.S.C. § 1951) and conspiracy so to do (18 U.S.C. § 371) (Tr. 38), Marion acknowledged that he had initiated the plan to damage Capasso's trucks (D. App. 110a, 123a), and asserted he had done so in order to influence Capasso in a corporate vote that was pending (D. App. 114a-115a). Marion repeatedly asserted, however, that he could not recall the nature of the vote about which he had sought to influence Capasso (D. App. 114a, 116a, 124a, 127a). When confronted with the Tortora conversation and the evidence he had told Tortora to charge for his work because there were other people involved, Marion claimed he really had intended to pay Tortora himself and, illogically, that this would have been cheaper for him even though Tortora had offered to do the job as a favor (D. App. 119a-121a, 131a-132a). Eventually, when pressed, Marion claimed that no one else was involved in the plan and that he had referred to the other people in the telephone conversation solely in an effort to impress Tortora, whom he believed to be influential in organized crime in New York (D. App. 127a, 132a-133a). Marion's testimony in these respects was the basis for the obstruction of justice charge in Count Three.

The second conversation, between Marion and one Jack Denero ("the Denero conversation"), was intercepted on March 16, 1972 pursuant to the Delmonico order. During this exchange, Denero mentioned a "thing [they]

were talking about" and told Marion that his "closest friend went to Buffalo . . . to pick it up for [him]." When Marion asked whether "it's an unregistered one," Denero replied that he did not want to talk. After discussing arrangements for hand delivery of the "thing" to Marion in Las Vegas by an intermediary, Marion told Denero that Quatrone, the courier, should put "it" in his suitcase, not his coat, in order to avoid detection.

In his testimony of December 20, 1973 and January 8, 1974 before the grand jury, which was then investigating, among other things, the "transportation of firearms across a state line" and Marion's purpose in wanting the firearm (Tr. 38), Marion acknowledged that he had asked Denero, whom he knew to be a police officer in Syracuse, New York, to obtain an unregistered pistol for him (D. App. 134a-137a). He also stated that he knew that an abortive effort to bring him a pistol had been made by James Quatrone, also a Syracuse, New York police officer, and that his instructions to Denero regarding how the weapon should be transported by Quatrone were intended to avoid detection of it by sky marshals (D. App. 138a, 143a, 173a). During his grand jury testimony on December 20, 1973, Marion gave diverse and inconsistent reasons for having sought the weapon, including that he was "just kidding around" (D. App. 134a); that he asked for it because "it sounded good" (D. App. 136a); that he did not want it at all" (D. App. 136a); that he was "half kidding and half serious" (D. App. 139a); that he was just testing Denero (D. App. 141a); that he really didn't know why he wanted the weapon (D. App. 142a); and that he wanted it "just to have another pistol around the house" (D. App. 140a). When he reappeared before the grand jury on January 8, 1974, Marion declined an express opportunity to correct or change any of his prior testimony (D. App. 147a-149a). Thereafter on that date he testified that he wanted the pistol in order to be able

to sell it in Las Vegas (D. App. 174a-176a). Shortly thereafter, Marion declined a second opportunity to correct his testimony and was then excused (D. App. 176a-177a). The foregoing testimony of his purpose in seeking the firearm was alleged to be false and evasive and constituted the predicate for the obstruction of justice charge contained in Count Two of the indictment. The inconsistency between his declaration of December 20, 1973—that he wanted the weapon to keep "around the house"—and his declaration of January 8, 1974—that he wanted the weapon for resale in Las Vegas—was the basis of the perjury charge in Count One.

The Defense

Marion did not testify.

His only witness was William I. Aronwald, the Special Attorney of the United States Department of Justice, who questioned him before the grand jury. Mr. Aronwald was examined concerning the physical circumstances surrounding Marion's appearance before the grand jury; the availability of the transcripts of the Tortora and Denero conversations to Marion during and between his appearances; Marion's access to counsel during his testimony; and the accuracy of references to the Tortora and Denero conversations during the questioning.*

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* Defense counsel's motivation in calling Mr. Aronwald apparently was to provide a basis for his request that the jury be charged that if it found that there had been harassment, deception or overbearing by the prosecutor during Marion's grand jury appearances they should acquit the defendant (Tr. 250). The trial court declined to charge as requested but did instruct the jury that it could consider any such evidence of prosecutorial misconduct as it bore on Marion's criminal knowledge and intent to commit the crimes charged (Tr. 339-340, 363-364).

ARGUMENT

POINT I

The fruits of the New York State eavesdropping warrants—properly executed in accordance with the controlling provisions of state law—were properly adduced before the federal grand and petit juries which heard this case. The federal use of those intercepted communications required no prior judicial approval under 18 U.S.C. §2517(5).

Marion attacks the propriety of the introduction of two telephone communications of his, seized pursuant to two New York State eavesdropping warrants, before the federal grand and petit juries which heard this case. Acknowledging that the intercepted communications clearly relate to the state crimes designated in the pertinent state warrants and that accordingly the communications were properly intercepted and recorded by state authorities in the first instance, Marion contends that Section 2517(5) of Title 18 of the United States Code is controlling * and that it precludes the use of such

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* Section 2517(5) of Title 18 of the United States Code provides:

> When an investigative or law enforcement officer, while engaged in intercepting wire or oral communications in the manner authorized herein, intercepts wire or oral communications relating to offenses other than those specified in the order of authorization or approval, the contents thereof, and evidence derived therefrom, may be disclosed or used as provided in subsections (1) and (2) of this section. Such contents and any evidence derived therefrom may be used under subsection (3) of this section when authorized or approved by a judge of competent jurisdiction where such judge finds on subsequent application that the contents were otherwise intercepted in accordance with the provisions of this chapter. Such application shall be made as soon as practicable.

evidence in a federal investigation and prosecution, unless separate federal judicial approval is secured prior to any such federal use. The contention is clearly erroneous and thoroughly misguided. Whether the evidence of Marion's telephone communications was properly adduced here turns on the validity of the execution of the state warrants—an issue to be determined by reference to state law and not, as Marion contends, federal law. Since Marion does not, and could not, contend that the interception and recordation of his conversations somehow violated the controlling provisions of state law, the admission of those conversations here was entirely proper.

It is well settled that no additional state or federal judicial approval is required prior to the introduction in a federal forum—concerned with the investigation or prosecution of federal criminal violations—of telephone conversations which relate in the first instance to state criminal violations and which have been lawfully intercepted and recorded pursuant to valid state eavesdropping warrants. If the communication intercepted is within the ambit of the state eavesdropping warrant which is the predicate for its interception, or is otherwise validated in accordance with the pertinent provisions of state law, evidence of the conversation may be used without more in any federal forum. *United States* v. *Tortorello*, 480 F.2d 764, 781-783 (2d Cir.), *cert. denied*, 414 U.S. 866 (1973); *United States* v. *Rizzo*, 492 F.2d 443, 447 (2d Cir.), *cert. denied*, 417 U.S. 944 (1974). Marion's reliance on 18 U.S.C. § 2517(5) for a contrary view is grossly misplaced.

In *Tortorello*, New York State authorities intercepted conversations relating to the acquisition and distribution of *fraudulent* securities pursuant to a state eavesdropping warrant authorizing the interception of communications relating to the acquisition and distribution of *stolen* securities. In *Rizzo*, New York State authorities incidentally

intercepted a communication relating to the crime of counterfeiting pursuant to a state eavesdropping warrant which made no mention of that crime. Although there had been no prior federal judicial approval under 18 U.S.C. § 2517(5) of the kind Marion says is necessary here, this Court held that the intercepted communications were properly admitted in both those federal criminal prosecutions. In so doing, the Court indicated that the pertinent question (and one which was to be answered by reference to state law) was whether the intercepted communication related to the state crimes for which the eavesdropping warrant had been issued or, if it did not, whether state officials had properly validated the intercepted communication pursuant to the governing provisions of state law (CPL § 700.65(4)).* This Court concluded that under New York law if the incriminating conversations were not "*totally unrelated* to the crime for which the warrant was issued", then there was no need for any further judicial validation pursuant to CPL § 700.65(4) and the challenged conversations were fully admissible without more in any subsequent federal proceeding. *United States* v. *Tortorello, supra*, 480 F.2d at 782-783 n.16, quoting from McKinney's 1966 Session

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* Section 700.65(4) of the Criminal Procedure Law, provides:

> When a law enforcement officer, while engaged in intercepting communications in the manner authorized by this article, intercepts a communication which was not otherwise sought and which constitutes evidence of any crime that has been, is being or is about to be committed, the contents of such communications, and evidence derived therefrom, may be disclosed or used as provided in subdivisions one and two. Such contents and any evidence derived therefrom may be used under subdivision three when a justice amends the eavesdropping warrant to include such contents. The application for such amendment must be made by the applicant as soon as practicable. If the justice finds that such contents were otherwise intercepted in accordance with the provisions of this article, he may grant the application.

Laws of New York, Memorandum 2293, 2296 (emphasis in original). That same conclusion is compelled here, *a fortiori*, given the circumstances that obtain.

Indeed, Marion does not even contend, nor could he, that his intercepted telephone communications were "not otherwise sought" (CPL § 700.65(4)) by the respective eavesdropping warrants (the Lounge and Delmonico orders) in question. The Tortora conversation, which revealed Marion discussing what might fairly be called a "contract" to damage the property of another person, was intercepted pursuant to the Lounge order which authorized the interception of communications relating to the crime of grand larceny by extortion. New York Penal Law, Art. 155. The Denero conversation, which revealed Marion discussing an "unregistered thing" and plans to transport the "thing" interstate by covert means, was intercepted pursuant to the Delmonico order which authorized the interception of communications relating to the crime of possession of dangerous weapons, New York Penal Law, Art. 265. Clearly no amendment of the original eavesdropping warrants was required by CPL § 700.65(4) and no further judicial authorization was required by that or any other statute prior to the use of the challenged communications in this prosecution. The District Judge properly so found (D. App. 90a). That finding is wholly in accord with the reason for the existence of the amendment procedures provided for by New York CPL § 700.65(4) and 18 U.S.C. § 2517(5): to prevent a lawfully obtained eavesdropping or wiretap order from being used as a general warrant, *i.e.*, as a subterfuge to search for and seize communications relating to crimes not designated in the order. *See Berger* v. *United States*, 388 U.S. 41 (1967); *United States* v. *Tortorello*, *supra*, 480 F.2d at 782; *People* v. *Rizzo*, 70

Misc. 2d 165, ——, 333 N.Y.S. 2d 152, 153 (Dutchess Cty. Ct. 1972).*

Marion's reliance on *United States* v. *Brodson*, Dkt. No. 75-1452 (7th Cir. Dec. 12, 1975), and *United States* v. *Campagnuolo*, Dkt. No. 75-36-Cr-Cf (S.D. Fla. Dec. 31, 1975), as support for his contentions is wholly misplaced. In both those cases the Court was confronted with the propriety of the introduction in a federal prosecution of evidence seized pursuant to a federal wiretap order. In both cases the execution of the respective federal warrant apparently had led to the seizure of communications that related both to the gambling offense designated in the order (18 U.S.C. § 1955) and to a related gambling offense that was not specified therein (18 U.S.C. § 1084). The challenged evidence, in each instance, was later presented to a federal grand jury investigating, *inter alia*, possible violations of 18 U.S.C. § 1084—the offense not designated in the respective federal wiretap order—and in each case the defendant was indicted for a violation of that offense. *Brodson* and *Campagnuolo* held that the introduction of those communications before the pertinent federal juries constituted error requiring dismissal of the indictment. Those holdings were premised on the courts' statutory construction of 18 U.S.C. § 2517(5) which, even if correct,**

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* Indeed, it is impossible to conceive how this policy of avoiding electronic fishing expeditions, underlying both 18 U.S.C. § 2517(5) and CPL § 700.65(4), would even be implicated, much less in any manner furthered, in a case such as this by requiring a federal judge to authorize for federal use a communication lawfully intercepted and seized in the first instance by state authorities pursuant to a state warrant.

** We doubt for several reasons the correctness of the decisions in *Brodson* and *Campagnuolo*. It suffices to note here that the policy reason underlying the amendment procedure of 18 U.S.C. § 2517(5)—to prevent a wiretap order from being used as a

[Footnote continued on following page]

could have no applicability to the case at bar. Section 2517(5) governs the execution of federal wiretap orders only and not New York State eavesdropping warrants as well. The latter are governed solely by New York CPL § 700.65(4), and the New York authorities construing the same. See *United States* v. *Tortorello, supra*. *Brodson* and *Campagnuolo* are simply inapposite to the present issue.

POINT II

The trial judge properly found as a matter of law that Marion had not recanted his false grand jury testimony within the meaning of 18 U.S.C. § 1623(d).

Marion attacks his conviction on Count One for perjury, brought upon the basis of his contradictory grand jury testimony. Glibly asserting that his testimony during his second grand jury appearance was truthful, he contends that the inconsistency between that testimony and that of his first grand jury appearance was itself

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general warrant—would seem to be fully protected by construing that section, as New York State authorities do CPL § 700.65(4), to require further judicial approval or authorization only where the intercepted communication is "*totally unrelated* to the crime for which the warrant was issued". McKinney's 1968 Session Laws of New York, Memorandum 2293, 2296, as quoted in *United States* v. *Tortorello*, 480 F.2d at 783 n.16 (emphasis in original). The contrary statutory construction adopted in *Brodson* and *Campagnuolo* invokes a literalism whose contingent consequences would require federal prosecutors, each time a communication was intercepted which was within the ambit of the predicate federal wiretap order, to seek nonetheless to catalogue all possible federal crimes, no matter how dimly perceived, to which such a communication might also relate so that the procedures *Brodson* and *Campagnuolo* deemed required by 18 U.S.C. § 2517(5) could be undertaken and the abortion of some possible future prosecution thereby averted.

sufficient evidence that he had recanted his earlier untruthful testimony to require the District Court to submit that defense to the jury for its consideration. The contention is without merit. Whether a defendant is to benefit from the recantation provisions of 18 U.S.C. § 1623(d) is a question to be addressed not to the jury but to the judge by a pretrial motion. Here, even assuming Marion timely raised this issue by such a motion, it is clear beyond any genuine issue of fact that he wholly failed to meet the requirements of the "recantation" defense.

1. It was entirely proper for the trial judge, rather than the jury, to decide the issue of "recantation".

Section 1623(d) of Title 18, United States Code, on which Marion relies, provides:

> "Where, in the same continuous court or grand jury proceeding in which a declaration is made, the person making the declaration *admits such declaration to be false*, such admission *shall bar prosecution* under this section if, at the time the admission is made, the declaration has not substantially affected the proceeding, or it has not become manifest that such falsity has been or will be exposed" (emphasis added).

Unlike the last sentence of 18 U.S.C. § 1623(c), which provides for a "defense" to a prosecution under that subdivision,* 18 U.S.C. § 1623(d) provides that a recantation "shall bar prosecution". In this respect Section

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* 18 U.S.C. § 1623(c) provides in pertinent part:

> It shall be a defense to . . . [a prosecution under subsection (c)] . . . that the defendant at the time he made each declaration believed that the declaration was true.

1623(d) departs as well from the New York recantation statute, New York Penal Law § 210.25, from which it was taken.* *See United States* v. *Del Toro*, 513 F.2d 656, 665 n.5 (2d Cir.), *cert. denied*, 44 U.S.L.W. 3185 (October 6, 1975); H.R. Rep. 91-1549, 2 U.S. Code Cong. and Admin. News 4024 (1970). In consequence, this Court has said that:

> "[S]ince § 1623(d) says that an admission of the falsity of the prior declaration *shall bar prosecution*, it would seem that the defense should be raised prior to trial, and disposed of then by the judge (emphasis in original)."

United States v. *Kahn*, 472 F.2d 272, 283 n.9 (2d Cir.), *cert. denied sub nom. Teleprompter Corp.* v. *United States*, 411 U.S. 982 (1973); *accord*, *United States* v. *Lardieri*, 497 F.2d 317, 321 (3d Cir.), *on rehearing*, *aff'd*, 506 F.2d 319 (3d Cir. 1974).**

2. The trial judge's finding that Marion had not recanted was entirely correct.

Even if it could properly be said that Marion timely sought before trial to bar this prosecution, as required, it is clear that the trial judge's rejection of that defense

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* New York Penal Law § 210.25 provides:

> In any prosecution for perjury it is an *affirmative defense* that the defendant retracted his false statement in the course of the proceeding in which it was made before such false statement substantially affected the proceeding and before it became manifest that its falsity was or would be exposed (emphasis added).

** Even if the issue of recantation is one for the jury, Marion's failure to meet the requirements of Section 1623(d) was established beyond any genuine issue of fact (see, *infra*, pp. 14-16), and accordingly he was not entitled to an instruction on his affirmative defense, *e.g.*, *United States* v. *Nieves*, 451 F.2d 836 (2d Cir. 1971); *United States* v. *Russo*, 442 F.2d 498, 503-504 (2d Cir. 1971), *cert. denied*, 404 U.S. 1023 (1972).

was entirely proper.* Marion simply did not "recant" as Section 1623(d) requires. When he appeared before the grand jury on January 8, 1974, Marion did not "admit" that his prior testimony of December 20, 1973 was false. Indeed, although he was given, at the outset of his second appearance, an opportunity to change or correct any of his earlier testimony, he declined to do so (D. App. 147a-148a). Thereafter, near the end of his second appearance, he testified that he had sought the pistol in question for the purpose of reselling it in Las Vegas. Moments later, at the end of his testimony, he explicitly declined yet another opportunity to recant any previous, false testimony. Despite having twice refused to tell the grand jury which one, if any, of the multiple reasons for obtaining the pistol he had testified to was the truth—on which the grand jury could rely—Marion now contends that his last declared reason for seeking the pistol (*i.e.*, for resale in Las Vegas) was the truth **

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* Ordinarily a defendant's failure to move before trial, pursuant to Rule 12(b)(2), Fed.R.Crim.P., to bar the prosecution will constitute a waiver by him of any of the benefits of 18 U.S.C. § 1623(d). *United States* v. *Lardieri, supra,* 497 F.2d at 321. While in the instant case Marion did raise before trial—and secure from the trial judge at the close of the Government's case an adverse ruling on—the question of whether the judge would permit Marion to submit the recantation defense to the jury (Tr. Sept. 23, 1975, p. 1471; Sept. 24, 1975, pp. 136, 147; Sept. 25, 1975, pp. 172-185), Marion apparently never did file any pretrial motion for an order dismissing the indictment pursuant to Section 1623(d).

** Marion's current assertion that this testimony during his second grand jury appearance was necessarily truthful amounts to little more than counsel's empty rhetoric. We do not know even now whether any one of the several reasons for seeking the pistol to which Marion testified is the truth or whether, for example, Marion desired that weapon in order to use it as an instrument in the commission of some other, undisclosed crime. Marion's contention that the testimony on which he relies as evidence of his recantation is truthful because it constitutes a declaration against penal interest ignores, among other things, the fact that that testimony was both compelled and immunized by the so-called use immunity provisions.

and, by implication, constituted a recantation of any prior false testimony, even absent an express admission of falsity. Manifestly, however, what Marion did did not constitute recantation. *Llanos-Senarillos* v. *United States*, 177 F.2d 164, 166 (9th Cir. 1949).

The "recantation" provisions of 1623(d) are designed to induce a person to return to the grand jury to correct perjury, not to add further confusion to the grand jury's investigations by testifying to yet further and inconsistent reasons for the particular conduct in issue without specifying which, if any, is the truth.* The statute encourages truth-telling by giving a witness who has lied a second chance, under certain circumstances, to be truthful. But the statute quite plainly and properly does not excuse a prior perjury of the witness unless he purges himself of the prior falsehood by admitting that he lied—which plain rejection of his first testimony at the same time serves to make the truth of his second testimony the more clear to the court or grand jury. This Marion did not do, and he cannot, therefore, claim a defense under § 1623(d). Indeed, as the trial court noted (Tr. 145-146, 180-181, 369-370), the logical effect of Marion's position —that a recantation defense is made out, without more, whenever a defendant can point to inconsistent grand jury testimony—would be to bar perjury prosecutions grounded on contradictory declarations and render Section 1623(c) a nullity.

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* Indeed, Marion's failure during his grand jury appearance to resolve this inconsistent testimony could well be viewed as having "substantially affected the proceeding", and may thus constitute a wholly separate ground for denying Marion the benefits of Section 1623(d). *See United States* v. *Krogh*, 366 F. Supp. 1255 (D.D.C. 1973).

POINT III

The evidence was more than sufficient to prove that Marion endeavored to obstruct justice within the meaning of 18 U.S.C. § 1503.

Reiterating some of the arguments he advanced unsuccessfully to the trial jury, Marion again contends that the Government failed to prove that his testimony before the grand jury was either false or evasive and that, accordingly, his conviction of obstruction of justice, 18 U.S.C. § 1503, under Counts Two and Three of the indictment must fall. The contentions are devoid of merit.

It is well settled that a witness' deliberate attempt to frustrate a federal grand jury investigation through the means of false and evasive testimony may constitute an endeavor to obstruct justice in violation of 18 U.S.C. § 1503. In such circumstances the gist of the crime is not the falsity of the testimony but the deliberate concealment of the witness' knowledge. *United States* v. *Cohn*, 452 F.2d 881, 884 (2d Cir. 1971), *cert. denied*, 405 U.S. 975 (1972). *See United States* v. *Alo*, 439 F.2d 751, 754 (2d Cir.), *cert. denied*, 404 U.S. 850 (1971).

In the instant case, whether Marion's grand jury testimony was false and evasive and constituted a deliberate attempt to conceal information was a question of fact for the jury. The latter, by its verdict, decided that question adversely to Marion in accordance with legal instructions which Marion does not, and could not, challenge. Among other things, the jury was carefully instructed that a finding of falsity or evasion would not alone suffice to establish the obstruction of justice offense.*

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* The trial court's charge on this subject included the following:

> Next, you must determine beyond a reasonable doubt that the defendant by his testimony endeavored to influence or obstruct or impede the due administration of justice.

[Footnote continued on following page]

In order to determine whether a defendant's testimony was false or evasive, you should consider the whole of the defendant's testimony, including any inherent inconsistencies or irreconcilable contradictions therein. If you find beyond a reasonable doubt that the testimony that the defendant gave was false or evasive, that is, the testimony quoted in the indictment, was false or evasive, then you must determine whether those false or evasive answers constituted or reflected a corrupt endeavor to influence, obstruct or impede the due administration of justice. The word "corrupt" doesn't add an additional element to the crime and I charge you as a matter of law that any unauthorized endeavor to obstruct or impede the due administration of justice is corrupt and violates the law. The due administration of justice includes an official inquiry undertaken by a grand jury, such as the inquiry in which the grand jury before which the defendant testified was engaged. The issue, therefore, is whether the defendant endeavored or attempted to influence or obstruct or impede the inquiries undertaken by the grand jury in this instance. Obstruction of justice includes not only false testimony but concealing from a grand jury information which is relevant and germane to its functions and which is called for by the questions which are directed to the witness (Tr. 345-46).

In response to the jury's request during their deliberations the Court further charged, *inter alia*:

The fourth element is that the defendant by his testimony corruptly endeavored to influence, obstruct or impede the due administration of justice.

Well, with respect to that fourth element I have already told you that if he gave false of evasive testimony that would constitute influencing, obstructing or impeding the due administration of justice. What you really need to determine with respect to the fourth element is whether or not beyond a reasonable doubt the defendant gave that testimony knowingly and willfully in an effort to interfere with the objectives of the grand jury. So you really have to find, number one, did he give false or evasive testimony and, number two, did he do it knowingly and wilfully in an effort to interfere or obstruct the grand jury proceeding. (Tr. 379-380).

Additionally the Court stated that:

Section 1503, "Whoever obstructs, impedes or endeavors

[Footnote continued on following page]

In light of the foregoing, Marion's reliance on *United States* v. *Essex*, 407 F.2d 214 (6th Cir. 1969), is clearly misplaced. In *Essex*, the court was confronted with the affidavit of a juvenile which had been voluntarily submitted to a trial court in support of a motion for a new trial by James Hoffa. The defendant's statement in that affidavit that she had engaged in improprieties with members of the trial jury during their deliberations was concocted out of whole cloth. Her prosecution for a violation of Section 1503 was predicated solely on the alleged falsity of the foregoing statement. The Government neither contended nor proved that the defendant had *concealed*—in contrast to falsely manufactured—information sought by an inquiring body.

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to obstruct or impede" the work of the grand jury is guilty of the offense charged in Section 1503. You don't have to be successful, you only have to endeavor, because, of course, in order to find that he endeavored you must find beyond a reasonable doubt that his endeavor involved giving either false or evasive testimony and that it was done knowingly and intentionally in an effort to obstruct or impede the work of the grand jury and you must find each of those two elements beyond a reasonable doubt (Tr. 384).

And finally the jury was instructed that:

> [O]bstruction of justice includes concealing from the grand jury information which a witness has and which he is asked to give. If I have information, if I am a witness and I am asked a question which would require me to give that information in response to the question and I conceal the information rather than giving it in response to the question, I have been guilty of obstruction of justice. So it is not merely false testimony but evasive action which would include concealing information which I have which is called for by a question which is asked of me before the grand jury (Tr. 385).

The defendant did not object to any of these instructions.

In contrast, Marion was here charged with giving false and evasive testimony to a grand jury which sought that testimony in connection with an on-going investigation. In determining whether Marion had endeavored to obstruct justice by deliberately concealing information, the jury here could properly have considered any falsity of Marion's testimony, its inherent incredibility, and any inconsistencies therein. *See Schleier* v. *United States*, 72 F.2d 414 (2d Cir.), *cert. denied*, 293 U.S. 607 (1934); *United States* v. *M Govern*, 60 F.2d 880 (2d Cir.), *cert. denied*, 287 U.S. 650 (1932); *Collins* v. *United States*, 269 F.2d 745 (9th Cir. 1959), *cert. denied*, 362 U.S. 912 (1960).

Marion's testimony was replete with each of the foregoing elements. In his testimony of December 20, 1973 and January 8, 1974 (Count Two), Marion provided a multiplicity of supposed reasons for his efforts to obtain an unregistered pistol.* Furthermore, although on December 20, 1973—when questioned about having asked Tortora to damage Capasso's trucks (Count Three)—Marion assertedly was able to recall many of the surrounding circumstances, including the fact that it was a pending corporate vote by Capasso that had motivated Marion in the first instance, he claimed at least four times that day an inability to remember what the vote was about. Beyond that, his explanation that it would have been cheaper for him to pay Tortora even though the lat-

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* We fail to see how Marion's endeavor to obstruct justice by his inconsistent testimony on December 20, 1973 could possibly have been "cured" by his testimony of January 8, 1974—even assuming that the testimony he gave during the latter appearance had the remedial effect he attributes to it. Section 1503 simply provides for no such defense. The crime arises and is complete with the corrupt endeavor, irrespective of the latter's success or failure.

ter had offered his services free of charge as a favor was an utter absurdity.*

With this sort of evidence before it, which must now be viewed most favorably to the Government, *Glasser* v. *United States*, 315 U.S. 60 (1942), the jury had a more than ample basis for its verdict, which should not be disturbed.

CONCLUSION

The judgment of conviction should be affirmed.

Respectfully submitted,

THOMAS J. CAHILL,
United States Attorney for the Southern District of New York, Attorney for the United States of America.

CARL M. BORNSTEIN,
Special Attorney,
United States Department of Justice.

JOHN C. SABETTA,
Assistant United States Attorney,
Of Counsel.

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* Marion's passing suggestion (Brief at 13) that his testimony was not material to the grand jury's investigation is frivolous. A comparison of the pertinent questions and Marion's answers with the stated purposes of the grand jury's inquiry reveals a clear and obvious relationship and compels the conclusion that Marion's evasive and untrue declarations had "a natural effect or tendency to influence, impede or dissuade the grand jury from pursuing its investigation." *United States* v. *Mancuso*, 485 F.2d 275, 280 (2d Cir. 1973).

APPENDIX

New York State Eavesdropping Warrant No. 72-12— "The *Lounge* Order," February 3, 1972

SUPREME COURT OF THE STATE OF NEW YORK

COUNTY OF NEW YORK

In the Matter of the interception of certain wire communications transmitted over telephone lines and instruments presently assigned numbers 475-9818 and 228-9834 located in, and subscribed to by, Jimmy's Lounge, 211 Ave. A, County, City and State of New York.

In the Matter of the interception of certain wire conversations transmitted over telephone line and instrument presently acquiring number 674-9481 located in and subscribed to by, the L & S Coffee Shop, 201 Ave. A, County, City and State of New York.

It appearing from the affidavits of Frank S. Hogan, District Attorney of the County of New York, Ronald Goldstock, Assistant District Attorney of the County of New York, and Robert Nicholson, New York City Police Department, said affidavits having been submitted in support of this eavesdropping warrant and incorporated herein as a part hereof, that there are reasonable grounds to believe that evidence of the crimes of Promoting Gambling, Grand Larceny by extortion in violation of Article 155 of the Penal Law, Possession of Gambling Records in violation of Article 225 of the Penal Law, Felonious Assault in violation of Article 122 of the Penal Law and Conspiracy to commit said crimes may be obtained by intercepting certain wire communications transmitted over the above-captioned telephone lines and instruments,

New York State Eavesdropping Warrant No. 72-12—
"The Lounge Order," February 3, 1972

and the Court being satisfied that comparable evidence essential for the prosecution of said crimes could not be obtained by other means, it is

ORDERED, that the District Attorney of the County of New York, or any police officer of the City of New York acting under the direction and supervision of said District Attorney, is hereby authorized to intercept and record the telephonic communications of the persons described in the supporting affidavits herein, their co-conspirators, agents and associates as described and delineated in paragraph 8 of the herein incorporated affidavit of Ronald Goldstock, transmitted over the above-captioned telephone lines and instruments and it is further

ORDERED, that nothing herein contained shall be construed as authorizing the District Attorney or his agents to overhear or intercept any communication which appears privileged or unrelated to the aforementioned crimes, and it is further

ORDERED, that the agents and employees of the New York Telephone Company are directly constrained not to divulge the contents of this order nor the existence of electronic eavesdropping over the above-captioned telephone lines and instruments to any person including but not limited to the subscriber of the above-captioned telephone instrument whether or not the said subscriber requests that the said telephone instrument be checked of the existence of said electronic eavesdropping equipment, and it is further

ORDERED, that this eavesdropping warrant shall be executed as soon as practicable and shall be effective the 8th day of February, 1972, and its authorization shall

New York State Eavesdropping Warrant No. 72-12—
"The Lounge Order," February 3, 1972

continue until the evidence described in paragraph 8 of the aforementioned affidavit of Ronald Goldstock shall have been obtained, and said authorization shall not automatically terminate when the communications described in said paragraph 8 have been first obtained, but in no event shall said authorization exceed thirty (30) days from its effective date, to wit, the 8th day of March, 1972.

/s/ HAROLD BIRNS

Justice of the Supreme Court

Dated: 2-3-72

Transcript of the Tortora Conversation on February 8, 1972

Transcript of conversation between Isadore Marion and Vincent Tortora on February 8, 1972:

ISADORE MARION:

(Unrelated portion of conversation)

VINCENT TORTORA:

(Unrelated portion of conversation)

TORTORA: Well, what's ah, up then?
MARION: Uh, this guy is, we gotta do something with him, so . . .
TORTORA: Alright. Just give me that uh, as much as you can an I'll take care of it.
MARION: Alright. The name is Capasso. C-A-.
TORTORA: C-A-P
MARION: P-A-S-S-O
TORTORA: S-S-O. Right.
MARION: He's, he's got his trucks in Lodi
TORTORA: Lodi.
MARION: Garbage guy.
TORTORA: Ah, garbage. Alright go ah . . .
MARION: He's got his garage in Lodi. He's got his office in Ridgewood
TORTORA: Ridgewood?
MARION: Yeah. Ridgewood, New Jersey.
TORTORA: Good. I got that.
MARION: Ah, if you. If they can mess up his trucks. You know, transmissions or . . .
TORTORA: (Interrupts) Alright.
MARION: . . . whatever they can
TORTORA: Alright. I, I heard that, just, right. This is important. Right?
MARION: Very important.

Transcript of the Tortora Conversation on February 8, 1972

TORTORA: Okay, You, ah, want nothing done to him personally.
MARION: Huh?
TORTORA: Nothing done to him . . .
MARION: Naw, not to him. Just to his trucks
TORTORA: Okay. Alright.
MARION: All, all his trucks if he can.
TORTORA: (Interrupts) How many 'as he?
MARION: Whatever it costs, let me know.
TORTORA: How many 'as 'e got?
MARION: I don't know; he may have about seven or eight of 'em.
TORTORA: You want him to hurt them all, alright?
MARION: Yeah.
TORTORA: (Interrupts) I got . . .
MARION: Whatever it costs, let me know.
TORTORA: I got to bet with these people—tomorrow at two o'clock in ah, in, ah, Bellville.
MARION: Okay.
TORTORA: And, I'll, I'll give 'em the whole rundown. And these guys are desperate. They'll, they'll do anything for, they owe me nine million favors.
MARION: Uh (unintelligible), well, you know. Then put a price on it.
TORTORA: Alright. Don't worry about it, just, just . . .
MARION: I mean, I mean I ain't paying for it.
TORTORA: Oh. Okay. Al—alright. Good enough. Okay. Oh. Beautiful, listen.
MARION: Capice? (Italian: Understand?)
TORTORA: Alright. Good, uh. Listen to me now.
MARION: But ah, be fair though, 'cause there's good people involved too.
TORTORA: Listen. It ain't easy. For you . . .

Transcript of the Tortora Conversation on February 8, 1972

MARION: All I want you to do is make it, you know, uh, fair.

TORTORA: For you, for you it's nothing.

MARION: I know, I know that, but it's not just for me.

TORTORA: Okay. Good. Alright. I'll, I'll make a figure and I'll call you . . .

MARION: (Interrupts) Yeah, good.

TORTORA: Before I do anything.

MARION: Alright.

TORTORA: Alright? Now I'll see these guys at two o'clock in the afternoon—two-thirty.

MARION: But you'd better do it good, you know, real good.

TORTORA: Don't worry about it (unintelligible)

MARION: Alright.

TORTORA: Listen to me.

MARION: Yeah.

TORTORA: Uh, I'll, I'll meet these people at two-thirty tomorrow. Right?

MARION: Yeah.

TORTORA: Then I'll talk—after I finish talking to them . . .

MARION: Hey! I got my license.

TORTORA: Yeah? Aw beautiful. You knew you were gonna get 'em.

MARION: I got it, man.

New York State Eavesdropping Warrant No. 72-32— "The Delmonico Order", March 15, 1972

SUPREME COURT OF THE STATE OF NEW YORK

COUNTY OF NEW YORK

In the Matter of the interception of certain wire communications transmitted over telephone lines and instruments assigned number 355-2500 extention 706 and 707 located in the suite known as 706-707 of Delmonico's Hotel, 502 Park Ave. County, City and State of New York and of certain oral communications occurring at said premises.

It appearing from the affidavits of Frank S. Hogan, District Attorney of the County of New York and Ronald Goldstock, Assistant District Attorney of the County of New York, said affidavits having been submitted in support of this eavesdropping warrant and incorporated herein as a part hereof, that there are reasonable grounds to believe that evidence of the felonies of Criminal Mischief, Grand Larceny, Felonious Assault, Burglary, Possession of Dangerous Weapons, Criminal Usury and Conspiracy to commit said crimes may be obtained by intercepting certain wire communications transmitted over the above-captioned telephone lines and instruments, and the Court being satisfied that comparable evidence essential for the prosecution of said crimes could not be obtained by other means, it is

ORDERED, that the District Attorney of the County of New York, or any police officer of the City of New York acting under the direction and supervision of said District Attorney is hereby authorized to intercept and record the telephonic communications of the persons

described in the supporting affidavits herein, their co-conspirators, agents and associates as described and delineated in paragraph 12 of the herein incorporated affidavit of Ronald Goldstock, transmitted over the above-captioned telephone lines and instruments, and it is further

ORDERED, that the District Attorney of the County of New York or any police officer in the City of New York acting under the direction and control of said District Attorney is hereby authorized to intercept and record the oral communications as described and delineated in paragraph 12 of the herein incorporated affidavit of Ronald Goldstock, of the persons described in the supporting affidavits herein, their co-conspirators, agents and associates as such communications occur at the above-captioned premises, and it is further

ORDERED, that the District Attorney of the County of New York, or any police officer of the City of New York acting under his direction and supervision is hereby authorized to make secret entry into the above-captioned premises to install and maintain the eavesdropping devices required to execute this warrant, and it is further

ORDERED, that nothing herein contained shall be construed as authorizing the District Attorney or his agents to overhear or intercept any communications which appears privileged or unrelated to the aforementioned crimes, and it is further

ORDERED, that the agents and employees of the New York Telephone Company are directly constrained not to divulge the contents of this order nor the existence of electronic eavesdropping over the above-captioned tele-

phone lines and instruments to any person including but not limited to the subscriber of the above-captioned telephone instruments whether or not the said subscriber requests that the said telephone instrument be checked of the existence of said electronic eavesdropping equipment, and it is further

ORDERED, that this Eavesdropping Warrant shall be executed as soon as practicable and shall be effective the 15th day of March and such authorization shall not automatically terminate when the evidence described in paragraph 12 of the aforementioned affidavit of Ronald Goldstock shall have been first obtained, but in no event shall said authorization exceed fifteen (15) days from its effective date, to wit, the 29th day of March 1972.

/s/ HAROLD BIRNS
Justice of the Supreme Court

Dated: 3-15-72
(Illegible)

Transcript of the DeNero Conversation on March 16, 1972

Transcript of conversation between Jack De Nero and Isadore Marion on March 16, 1972 at 7:00 P.M.

ISADORE MARION: Who?

JACK DE NERO: Jack, Syracuse

MARION: Yeah, Jack

DE NERO: How are you?

MARION: Fine, what's going on?

DE NERO: Good, is Joe with you?

MARION: Yeah he's downstairs.

DE NERO: Oh, they just blasted the shit out of him in the paper

MARION: I can't hear you.

DE NERO: Will you tell him they just blasted the hell out of him in the newspaper.

MARION: What did they say?

DE NERO: About that contract they got.

MARION: What did they say about it?

DE NERO: They say that the Salina Waste Plant is held illegal.

MARION: Oh yeah, we got that.

DE NERO: Oh, you got it already?

MARION: Yeah

DE NERO: Oh, I wanted to let you, I wanted to let him know.

MARION: Yeah.

MARION: Yeah.

DE NERO: Uh, Iz?

MARION: Yeah?

DE NERO: That thing that we were talking about.

MARION: Yeah?

DE NERO: My closest friend went to Buffalo; now he's going to try to, to pick that up for you.

Transcript of the Denero Conversation on March 16, 1972

MARION: Okay.
DE NERO: If he can't make it, Iz, I (pause) he's doing his best; he's there now.
MARION: I understand.
DE NERO: He left this afternoon.
MARION: It's an unregistered one though, huh?
DE NERO: "Io non parla" (phonetic—Italian—"I don't want to talk")
MARION: Okay.
DE NERO: Uh, so he'll hand deliver it personally
MARION: Very good.
DE NERO: So he's coming in Vegas on, ah, Monday
MARION: When?
DE NERO: Monday.
MARION: Okay. I should be there.
DE NERO: Yeah, he'll be in on a United 345 about 3:30 in the afternoon.
MARION: Three thirty in the afternoon?
DE NERO: Yeah.
MARION: Have somebody call me Sunday or Monday to remind me, please.
DE NERO: Call you where though?
MARION: Ah, call, ah, call my sister at her house.
DE NERO: Oh, I'll tell you as though Joe has, Joe's got him set up at Caesar's
MARION: He already got him set up?
DE NERO: Yeah, I think so.
MARION: Oh, ah, what he say? How do you know?
DE NERO: I was talking to him this afternoon.
MARION: What did he say?
DE NERO: He said he was going to set him up at Caesar's and I, I gave the kid your number, to call you when he gets there.
MARION: He was going to set him up at Caesar's?
DE NERO: Yeah.
MARION: Then let him do it.

Transcript of the Denero Conversation on March 16, 1972

DE NERO: Yeah. Right. But I mean, I gave the kid your number to call you when he gets there.

MARION: Okay. Well I, he gave me, Joe game me a piece of paper now what's this guy's name?

DE NERO: Quatrone

MARION: That's right!

DE NERO: Oh beautiful

MARION: Well he asked me to do it because he can't do it.

DE NERO: Oh, he asked you to do it?

MARION: Well certainly.

DE NERO: (Laughing). Okay

MARION: What's the fuck is this, what's this guy going to do?

DE NERO: Oh (laughing) sorry.

MARION: Oh yeah. Well ask Pullano, he'll tell you.

DE NERO: (Laughing) I'm sorry.

MARION: Please.

DE NERO: Oh, you going to take care of the kid then

MARION: Certainly, I'm going to take care of it. He can't

DE NERO: (Laughing) Oh beautiful.

MARION: Last night I got in a fucking argument with him. I says, you know, not over Concho (phonetic) over somebody else.

DE NERO: (Laughs)

MARION: This Bob Battle.

DE NERO: Oh. Anyway, what do you, what do you want me to do when he gets there on Monday, Iz?

MARION: Tell him I, I'll have him all set. What time is he arriving? Monday. Tell him I'll have him all set up Monday in the hotel.

Transcript of the Denero Conversation on March 16, 1972

DE NERO: Three thirty he's coming in.

MARION: He'll want the food, and, I mean everything comp. Right?

DE NERO: Yeah. The kid's a real shooter, Iz. He went down before on a, on a tour but this time he's, he's buying his ticket down, see?

MARION: Huh?

DE NERO: Last time he went down on a junket. This time he is buying his ticket down but he's a real, real shooter so if they can comp him, like you do with junkets, he shoots. He'll gamble.

MARION: Oh, good.

DE NERO: I mean he's a real one.

MARION: I'll get him all taken care of. What is it a single? Is he coming alone?

DE NERO: With his wife

MARION: Alright, Mr. and Mrs.

DE NERO: Quatrone, right.

MARION: Alright, for how many days?

DE NERO: I think only three days, I don't know.

MARION: Okay

DE NERO: He'll bust out by three days; he'll be back here.

MARION: Alright, well I'm, I'm doing it; no one else is doing it.

DE NERO: Oh. I didn't know. Aw Iz, thank you Iz.

MARION: I want you to know I'm doing it for you.

DE NERO: Oh, thank you. I appreciate it.

MARION: I'm doing it. Me. Izzydoro.

DE NERO: (Laughing) I appreciate it.

MARION: Never mind. Ole Izzy

DE NERO: (Laughing) Thanks Iz.

MARION: No. Because now I, ah, ah, I'm, I'm tired of, of other people doing something and those other people getting credit for it.

Transcript of the Denero Conversation on March 16, 1972

DE NERO: Well, I didn't know.
MARION: Well Jack, you dont understand the situation. Ask JP, He'll tell you.
DE NERO: Oh. Okay I didn't really know.
MARION: Yeah.
DE NERO: I was calling to give him a buzz, tell him they're blasting the shit out of him in the papers.
MARION: I know he, he, he's brought the paper with him.
DE NERO: Oh, he already had it?
MARION: Yeah.
DE NERO: Oh good. Now, the other thing now, on that thing, it's pretty tough with our, with our job here.
MARION: I understand, so don't worry if you haven't, can't, do it; I'll understand.
DE NERO: But he is in Buffalo right now.
MARION: Okay.
DE NERO: So he'll be back by midnight tonight.
MARION: Thank you, Compari.
DE NERO: So if he's got it he'll hand carry it down.
MARION: Thank you Jack.
DE NERO: Right Iz
MARION: I love you.
DE NERO: I'll see you.
MARION: Don't tell him to put it in his coat or they'll detect it.
DE NERO: Ah no, no.
MARION: Put it in his suitcase.
DE NERO: He knows.
MARION: Okay.
DE NERO: Right Iz.
MARION: Bye Jack
DE NERO: So long.
MARION: Bye-bye

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AFFIDAVIT OF MAILING

STATE OF NEW YORK)
) ss.:
COUNTY OF NEW YORK)

MICHAEL C. EBERHARDT being duly sworn, deposes and says that he is employed in the office of the Strike Force for the Southern District of New York.

That on the 23rd day of February, 1976 he served 2 copies of the within Brief by placing the same in a properly postpaid franked envelope addressed:

Oscar B. Goodman
230 Las Vegas Blvd. So.
Las Vegas, Nevada

And deponent further says that he sealed the said envelope and placed the same in the mail drop for mailing at the United States Courthouse, Foley Square, Borough of Manhattan, City of New York.

Michael C. Eberhardt
MICHAEL C. EBERHARDT

Sworn to before me this
23rd day of February, 1976

Steven K. Frankel
STEVEN K. FRANKEL
Notary Public, State of New York
No. 24-4607105
Qualified in Kings County
Commission Expires March 30, 19..77